

EX PARTE OR LATE FILED
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000
FACSIMILE: (202) 662-6291

GERARD J. WALDRON
DIRECT DIAL NUMBER
(202) 662-5360

DIRECT FACSIMILE NUMBER
(202) 778-5360

gwaldron@cov.com

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE: 44-171-495-5655
FACSIMILE: 44-171-495-3101
KUNSTLAAN 44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-549-5230
FACSIMILE: 32-2-502-1598

February 16, 1999

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Rm TWB 204
Washington, DC 20554

RECEIVED

FEB 16 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 96-115, FCC 96-221, Telecommunications Carriers' Use of
Customer Proprietary Network Information and Other Customer Information

Dear Chairman Kennard:

We write on behalf of INFONXX, a competitive directory assistance provider, in connection with the Commission's consideration of rules to implement Section 222(e) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. INFONXX urges the Commission to use this opportunity to promote competition in directory assistance services, an important segment of the telecommunications market. This rulemaking offers the Commission an opportunity to provide competitive directory assistance providers access to subscriber listings on the same terms as those provided to incumbents and competitive local exchange carriers which have entered that market. In particular, the Commission should:

(1) clarify that Section 222(e)'s mandate of "nondiscriminatory and reasonable rates, terms, and conditions" for access to subscriber list information is available to competitive directory assistance companies such as INFONXX; and

(2) adopt an appropriate definition of "nondiscriminatory and reasonable rates" which requires competitive directory assistance providers to be given the same rates for subscriber listing information as competitive local exchange providers are given under Section 251(b).

INFONXX Has Forged Competitive Inroads into the Directory Assistance Market

One of the last telecommunications markets to move towards competition has been directory assistance. In 1992, INFONXX, Inc. opened for business with five employees – the two founders and three telephone operators – and a realization that directory assistance, like customer premises equipment, long distance and local exchange, could be provided by an alternative to the incumbent monopoly. INFONXX was the first company to challenge an

No. of Copies rec'd
List ABCDE

012

The Honorable William E. Kennard
February 16, 1999
Page 2

incumbent provider in this market and many retail customers, mostly large businesses, welcomed the opportunity to switch to an alternate provider who could deliver directory assistance (DA) services at higher quality and better prices. More recently, INFONXX has become a "carriers' carrier" for directory assistance, providing DA services to a wide array of cellular carriers, including Airtouch and Bell Atlantic Mobile, as well as to competitive local exchange carriers such as Teleport. Today, INFONXX has 800 employees, operates four call centers, handles 75-100 million calls per year and provides service in seventy major markets around the country.

A central and quite frustrating challenge for INFONXX has been the absence of a level playing field upon which it can compete with incumbent local exchange carriers (ILECs) on the merits. As a result of their long-standing position as the dominant local exchange carriers, incumbent providers generally maintain master databases of all telephone subscribers in a state. In order to compete with the incumbents' DA service, INFONXX needs access to the incumbents' database of subscriber listings, because no other database can remain current in today's fast-moving environment. Unfortunately, and not surprisingly, incumbent providers have sought to maintain their unfair advantage -- through their preferential access to the subscriber listing information -- by fighting all efforts to require the subscriber listings to be made available to competitive DA providers on a non-discriminatory basis.

Some States Have Taken Positive Steps To Open The Directory Assistance Market to Competition, But More Action Is Needed To Benefit Consumers

In response to INFONXX's efforts, two states have already moved ahead to impose "equal access" obligations that require incumbent providers to share subscriber listing information with competitive DA providers at reasonable, nondiscriminatory, and cost-based rates.¹ As of yet, however, most states have not adopted these kinds of protections. Moreover, these efforts have not moved quickly because the incumbent LECs have regularly used delaying tactics to fight market opening measures that are designed to enable companies like INFONXX

¹ See Order Regarding Directory Database Issues, Case 94-C-0095, 187 P.U.R.4th 345, 346 (N.Y.P.S.C. July 22, 1998) (text was submitted as attachment to Association of Directory Publishers' October 21, 1998 ex parte) (incumbent providers ordered to provide cost-based access to subscriber data to all directory assistance providers in order to "benefit telephone customers by giving them more options for directory assistance service"); *id.* at 347 ("Offering directory database information on an equal basis to all telephone service providers and other companies, to be used for providing directory assistance or publishing a directory, will promote competition and help to level the playing field for producing directories and providing DA, thereby promoting better service at just and reasonable rates."); Order Instituting An Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, R. 95-04-043 (Cal. PUC Jan. 24, 1997) ("Independent directory publishers should be provided with the same updated information for published residential addresses on the same terms and conditions as the information to the LEC directory affiliates.").

The Honorable William E. Kennard
February 16, 1999
Page 3

tactics to fight market opening measures that are designed to enable companies like INFONXX to bring competition to the directory assistance market. Consequently, federal action can play a critical role in facilitating competition in the directory assistance marketplace.

Because the incumbent LECs have yet to be required to share the subscriber listing information with competitive DA providers on a non-discriminatory basis, INFONXX is forced to use inferior databases and must continually compete at an unfair disadvantage. As a result of INFONXX's inability to get this information from the incumbent at a fair price and reasonable terms, its customers end up spending more time and money seeking the relevant information and often get inaccurate information – with approximately 5,000,000 wrong numbers given out to Americans every year. In addition, INFONXX customers must bear an additional cost of \$10-\$20 million per year due to the inflated rates that INFONXX must pay the incumbent monopolists for access to subscriber list information. To date, INFONXX has been able to be successful even on a playing field tilted to the incumbent's advantage because we have been innovative in developing services such as a national directory assistance database and call completion, but because the incumbents are beginning to develop such features, it is critical to INFONXX's future success that competing DA providers be able to compete with incumbent LECs on a level playing field.

The Telecommunications Act of 1996 Calls For A Competitive DA Market

The procompetitive thrust of the Telecom Act sought to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."² This procompetitive vision has guided the Commission as it has sought to open up competitive opportunities through its rulemakings and adjudications under the Act. For example, the Commission's Local Competition Order made clear that incumbent LECs must provide access to directory assistance database information pursuant to Section 251(b) – i.e., at cost-based, reasonable, and non-discriminatory terms – so that competitive local exchange carriers (CLECs) could "provide operator services and directory assistance concerning incumbent LEC customer information."³ Second Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, at paragraph 538 (August 8, 1996); see

²See S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement of the Committee of Conference).

³ Second Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, at paragraph 538 (August 8, 1996); see also Southwestern Bell Tel. Co. v. AT&T, 1998 WL 657717, at *9 (S.D. Texas Aug. 31, 1998) (upholding equal access requirement for subscriber information).

The Honorable William E. Kennard
February 16, 1999
Page 4

also Southwestern Bell Tel. Co. v. AT&T, 1998 WL 657717, at *9 (S.D. Texas Aug. 31, 1998) (upholding equal access requirement for subscriber information).

Although Section 251(b) paved the way for competitive entry into the directory assistance market by CLECs, it did not specifically address whether competitive DA providers could take advantage of cost-based, reasonable, and non-discriminatory terms of access to subscriber listings.⁴ Congress did, however, address the terms of access to subscriber listings for competitive DA providers in another part of the Telecom Act. Section 222(e) states in relevant part:

A telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

47 U.S.C. Sec. 222(e).

This Proceeding Offers The Commission An Opportunity To Promote Competition In The DA Market

To implement the procompetitive mandate of Section 222(e), the Commission issued a notice of proposed rulemaking on May 28, 1996 that sought comments on the Act's requirement that telecommunications carriers make available "subscriber list information" on "reasonable and nondiscriminatory rates and conditions" to "any person for the purpose of publishing directories in any format." As part of its effort to adopt rules to implement this section, INFONXX urges the Commission to take two steps that are necessary to promote competition in the DA market: (1) define "publisher in any format" to include companies such as INFONXX which publish directory information in an oral form, and (2) recognize that "reasonable and nondiscriminatory" prices, terms and conditions might differ depending on what kind of publisher was at issue – i.e., a written yellow pages or a live operator responding to specific requests.

⁴The Common Carrier Bureau denied INFONXX's complaint that Bell Atlantic's tariff for subscriber listing information violated the standards set out in sections 201 and 251, largely on the ground that INFONXX was not a competitive local exchange carrier. See INFONXX v. NYNEX, File No. E-97-97-16 (CCB May 27, 1998) (attached as Appendix B). Quite significantly, this decision did not opine on what rules the Commission could implement under Sections 201 or 222(e), for example, to facilitate competition in the directory assistance market.

The Honorable William E. Kennard
February 16, 1999
Page 5

The Definition of "Publisher"

In construing Section 222(e)'s mandate in favor of "any person [requesting subscriber listing data] for the purpose of publishing directories in any format," the Commission should interpret the beneficiaries of this mandate to include not only written publishers of directory listings, but also DA providers who publish such information orally. This conclusion is supported by a sound textual reading of Section 222(e), an analysis of other provisions in the Communications Act, and the pro-competitive policies undergirding the Telecom Act. .

First, the language of Section 222(e) itself mandates a broad construction because it applies to publications "in any format" – a term which presumably would include oral as well as written or electronic transmissions of subscriber listings. Congress surely knows how to limit the scope of the term "publishing" – compare, for example, Section 274's treatment of "electronic publishing" – and so when Congress refers to publishing "in any format," Congress's plain language must be given its full meaning. Second, the word "publish" is used elsewhere in the Communications Act, and its meaning in those provisions clearly connotes the oral dissemination of information. For example, in Section 705, 47 U.S.C. Sec. 605, the Act makes it unlawful for anyone to "divulge or publish" the contents of any unauthorized reception of communication by wire or radio. As the Commission is well aware, this provision has been used in a number of criminal prosecutions where only oral communications have been involved. Under standard canons of statutory construction, the Commission must apply terms in a statute consistently unless Congress expresses a contrary intent. Thus, in this instance, where Congress modified "publish" to include "in any format," it demonstrated an intent to use the term in the same broad manner as it is used in Section 705. Third, the standard usage of "publish" or "publication" in other legal contexts, most notably libel and slander law, contemplates that a person can "publish" information through media other than a written text. See, e.g., Gertz v. Welch, 418 U.S. 323, 332 (1974) ("The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual . . ."). Finally, the procompetitive goals of the Telecom Act also call for a broad interpretation of this provision, since extending the protections of Section 222(e) to competitive DA providers will promote competition in this important segment of the telecommunications market.

The Honorable William E. Kennard
 February 16, 1999
 Page 6

The Definition of Non-Discriminatory and Reasonable

Both "reasonable" and "non-discriminatory" connote contextual standards. For written publications, an appropriate per listing rate may well satisfy this standard, since a per listing approach has been the standard practice for providing access to subscriber listings for publishers of yellow pages (and other written publications). For DA providers, however, the standard and prevailing practice is quite different because the market structure and the service provided is substantially different. Accordingly, the "non-discriminatory" standard requires that DA providers be afforded a rate structure similar to their competitors (and not one provided to the yellow pages publishers).

As discussed above, the directory assistance market is dominated by the incumbent telephone providers. Just recently, the major interexchange carriers – AT&T and MCIWorldCom – have begun to use the subscriber listing data received through interconnection agreements to enter the DA market by providing services to their own customers. Of the companies that are interested in serving wholesale customers – i.e., serving as a "carriers' carrier" for CLECs and cellular providers – INFONXX is one of only a small number willing and able to do so. Thus, in order to give smaller competitive local exchange providers a choice of DA companies other than the incumbent LEC, it is critical that competitive DA providers be given access to the subscriber listing data at the same terms provided to major CLECs such as AT&T and MCI under Section 251(b). Any less would be discriminatory.

In short, the Commission should make clear that Section 222(e) requires incumbent telephone companies to provide subscriber listing data to competitive directory assistance companies at the same terms at which it provides such data to itself and to major CLECs. In so doing, the Commission would take an important step towards opening up the directory assistance market to the full and fair competition that will give rise to better prices, more choice, and enhanced service offerings for American consumers.

* * * *

If the Commission is not prepared at this time to make clear that Section 222(e)'s non-discriminatory mandate gives competitive directory assistance providers the same right to the subscriber data used for DA as that provided to major CLECs under Section 251(b), it should at the very least recognize that the rate provided to written publishers under Section 222(e) may constitute a ceiling for DA providers, but that a different (and lower) cost structure may well be justified. This recognition would comport with the basic reality that the appropriate benchmarks for assessing discrimination are the rates provided to the incumbent providers' own DA operation as well as those rates provided to major CLECs, which are competitors of companies like INFONXX. In addition, this recognition would acknowledge that state commissions like New York, which have already instituted very different cost structures for written publications and for DA companies, are taking appropriate steps to open this market to competition. To that

The Honorable William E. Kennard
February 16, 1999
Page 7

end, it is worth noting that Bell Atlantic's cost study for access to subscriber listings in New York, which is now being adjudicated, proposes a per listing rate for written directories and a one-time and recurring rate for the entire database provided to DA providers and the CLECs interested in obtaining the data.

CONCLUSION

In sum, INFONXX urges the Commission to recognize the pro-competitive breadth of Section 222(e) as well as the important role that it can play in fostering competition in the directory assistance market. Specifically, we request that the Commission (1) define Section 222(e) to include persons who publish subscriber list information in oral form; and (2) make clear that the non-discriminatory rate for the subscriber listing information given to competitive DA providers is the same as the rate being made available to competitive local exchange providers under Section 251(b).

Thank you for your attention to this important issue.

Sincerely,



Evan Marwell
President
INFONXX, Inc.
3864 Courtney Street
Suite 411
Bethlehem, PA
(610) 997-1000



Gerard J. Waldron
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, D.C. 20044
(202) 662-5360

Counsel to INFONXX

February 16, 1999

cc: Ms. Magalie Roman Salas
Service List

CERTIFICATE OF SERVICE

On February 16, 1999, a copy of these comments were
delivered by hand to the following persons:

The Honorable William E. Kennard
Chairman
Federal Communications Commission
Room 8-B201
445 12th Street, S.W.
Washington, D.C. 20554

ATTN: Tom Power

The Honorable Harold Furchtgott-Roth
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20544

ATTN: Kevin Martin

The Honorable Gloria Tristani
Federal Communications Commission
Room 8-C302
445-12th Street, S.W.
Washington, D.C. 20554

ATTN: Paul Gallant

The Honorable Susan Ness
Federal Communications Commission
Room 8-B115
445 12th Street, S.W.
Washington, D.C. 20554

ATTN: Jim Casserly

The Honorable Michael K. Powell
Federal Communications Commission
Room 8-A204A
445-12th Street, S.W.
Washington, D.C. 20554

ATTN: Kyle Dixon

Lawrence E. Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

William A. Kehoe, III
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, S.W.
12th Street Lobby
Counter TW-A325
Washington, D.C. 20554

Bob Atkinson
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Lisa Zaina
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Kathryn C. Brown
Chief of Staff
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Carol E. Matthey
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554


Barbara E. D'Avilar